Liquid Carbonic Corporation, Inc. *and* **Angelo Vaccardo**

Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* **Angelo Vaccaro.** Cases 22-CA-9299 and 22-CB-4148

August 12, 1981

DECISION AND ORDER

On February 24, 1981, Administrative Law Judge Arthur A. Herman issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting brief.[1]

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent Employer, Liquid Carbonic Corporation, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, and the Respondent Union, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Union, New Jersey, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

CHAIRMAN FANNING, dissenting:

I would dismiss the complaint in its entirety because I do not agree with the restrictions placed on superseniority by *Dairylea Coorperative, Inc.*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), and its progeny. See my dissents in *Dairylea, supra; A.P.A Transport Corp.*, 239 NLRB 1407 (1979); and *The American Can Company*, 244 NLRB 736 (1979).

[1] The Administrative Law Judge erroneously stated in his Decision that Respondent Employer, who made no appearance at the hearing, was in effect represented by Respondent Union's counsel.

DECISION

STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge: This case was heard[1] at Newark, New Jersey, on April 21, 1980, upon a consolidated complaint issued on July 31, 1979, which complaint was based upon charges filed on June 14, 1979, by Angelo Vaccaro, an individual, in Cases 22-CA-9299 and 22-CB-4148. The complaint alleges, in substance, that the Respondent Employer, Liquid Carbonic Corporation, Inc., herein called the Company, and the Respondent Union, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, maintained and enforced an invalid superseniority clause in their collective-bargaining agreement, in violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended.

In their separate, duly filed answers, the Company and the Union deny the commission of any unfair labor practices.

Upon the entire record in this case, and upon the briefs of the General Counsel and the Union duly submitted, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT COMPANY

The Company, a Delaware corporation, with its principal office in Chicago, Illinois, is engaged in the storage and distribution of dry ice, carbon dioxide, and related products at its facility in Kearny, New Jersey, the only facility involved in this proceeding. Annually, the Company sells and ships goods valued in excess of $50,000 directly to sources located outside the State of New Jersey. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union admits, and I find, that it is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The consolidated complaint alleges, the Respondents admit, and I find that, at all times material herein, the Company and the Union have been parties to a collective-bargaining agreement covering truckdrivers, helpers, and platform men, effective from April 1, 1976, through March 31, 1979.[2] Section 22 of said agreement reads as follows:[3]

> Section 22—Stewards
>
> (A) The Employees shall elect one of its members to act as Shop Steward, whose duty shall be to

[1] Although the Company filed an answer in this proceeding, it made no appearance at the hearing. Counsel for the Union advised me on the record that the Company's position was synonymous with the Union's, and that, in effect, counsel for the Union was also representing the Company.

[2] On March 11, 1980, the Respondents executed the current collective-bargaining agreement which became effective retroactively on April 1, 1979, and expires on March 3, 1982. This agreement varies slightly with the prior agreement but, in pertinent part, does not affect the decision in this proceeding. See fn. 4, *infra.*

[3] Sec. 22 is unchanged in the current agreement.

see that the conditions of this Contract are not broken by either Employer or Employee(s). In case of a slack season, he shall be the last Employee to be laid off and under no consideration shall he be discriminated against. He shall take up with the Employer all grievances and complaints of the Employee(s), and make a reasonable effort to adjust them. Failing to do so, he shall refer them to his Union Business Agent. Under no circumstances shall he take it upon himself to discipline the Employer.

(B) Stewards shall be granted super-seniority for all purposes including layoff, rehire, bidding, and job preference.

(C) One Steward on the morning dispatch, in compliance with regular starting times, shall be the last man to leave the terminal (warehouse) at the Steward's option.

(D) The Steward is recognized by the Employer to have no right to enter into any form or type of agreement with the Employer, except as authorized by the Local Union, through its Business Agent.

Other relevant sections of the contract read as follows:

Section 7—Work Week—Hours—Starting Time—"Shape-up-Time"—Night Work

(A) Eight (8) consecutive hours, exclusive of the lunch hours, shall constitute a regular day's work for all employees covered by this Agreement, Monday to Friday, inclusive. All time worked by employee in excess of the eight hours, each day, Monday to Friday, inclusive, shall be paid for on the basis of the overtime rate per hour listed in Section 2, according to the employee's job classification.

(C) All Saturday (if not a holiday) work shall be paid for at the rate of time and one-half. Employees assigned to work on Saturday (if not a holiday) shall be guaranteed a minimum of five (5) hours and twenty (20) minutes work at time and one-half (1-1/2) or shall be paid for same by the Employer.

(F) The "Starting Time" for a "Regular Day's Work" for drivers and helpers shall be assigned from, and between 7:00 A.M., and 8:00 A.M., each day of the calendar week.

(G) Drivers and helpers assigned to start work at 12:00 Midnight or at any time thereafter until 7:00 a.m. shall be paid for all such time at the overtime rate listed in Section 2; and at 7:00 A.M., their regular day's work shall start.

(I) "Shape-Up-Time," etc.—The so-called "shape-up-time" for drivers and helpers who have not been assigned to start work earlier, shall be designated by the Employer, and shall be between the hours of 7:00 A.M. and 8:00 A.M.

(J) Drivers and helpers on the Seniority List shall "shape-up" (appear for work) no later than 8:00 A.M. Employees failing to "shape-up" by 8:00 A.M. shall forfeit their place on the seniority list for that day and shall not be placed to work until all other Employees who "shaped up" before 8:00 A.M. have been placed to work in seniority order. Drivers and helpers who were "booked" to work but appeared late shall also be placed at the bottom of the list for that day.

(K) During the so-called "shape-up" time, all available drivers and helpers shall be placed to work according to the Seniority List. However, a senior driver shall have preference to operate a vehicle for which the wage per day is highest, if qualified.

(L) Work assignments (routes, loads, deliveries, and pick-ups) shall be allocated by the Employer's discretion providing, however, the Employer does not discriminate when allocating same, and (2) seniority shall prevail on so-called "over-the-road-work" that the Employees have been performing during the terms of the labor contract, between the Employer and the Union, which expired on March 31, 1970, and senior drivers shall have preference on that so-called "over-the-road-work."

Section 8—Seniority

(A) Seniority—according to Job Classification—shall prevail at all times.

(B) The Employer shall compile a seniority list from the regular payroll records, subject to the approval of the Union.

(C) Employees shall be ranked in seniority according to their length of service with the Employer in the classification of work to which they are assigned. If an Employee leaves one classification to go to another, he shall become the junior Employee in the classification to which he has transferred.

(D) There shall be separate seniority lists for drivers, helpers and platform men.

(E) Senior drivers shall have preference to operate vehicles for which the wage per day is highest if qualified. The senior driver shall have preference of the longer trip or run on "over-the-road" trips.[4]

(I) Regular Employees (Platform Men) will remain on said shift for (60) calendar days, unless there is a temporary reduction of the work force, in which case, Employees in seniority order shall have the right to work on a shift that operates.

(N) All other work shall be allocated in strict conformity with the seniority list, i.e., an Employee (driver or helper) with most seniority shall be assigned to work at the first job allocated that day and the next senior Employee shall be assigned to the second job allocated that day, etc., however, senior men shall have preference on so-called "over-the-road" work that Employees have been performing during the term of the Labor contract between the Employer and the Union, which expired on March 31, 1970.

(O) Employees booked for work shall be booked according to seniority, providing it does not impair the efficiency of the operation. However, senior

[4] In the current agreement, the second sentence in this clause does not apply to the facility involved herein.

Employees (drivers and helpers) to those booked shall not be placed to work later than regular designated shape-up time.

Section 9—Holidays

(A) All Employees who are assigned to work on Sunday or the following holidays, *viz*: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday, Decoration Day, Independence Day, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving Day, Christmas Day, Employee's Birthday and any holiday called for by the State, shall be paid time and one-half for the regular eight hours worked, plus one day's pay. Overtime work on the above days shall be paid for at double the overtime rate listed in Section 2. This section does not apply when the holiday occurs on a Saturday. Paragraph D of Section 7 shall then apply.

Section 10—Vacations

(I) Summer vacation period is June 1 through September 15. Any employee entitled to five (5) weeks' vacation may take three (3) weeks at once during this summer period. Winter vacation period is October 1 through May 15.[5]

(L) Vacation schedule (which Employees and the weeks they are to go on vacation) shall be decided between the Employer and the Employees, and posted before June 1st of the years 1976, 1977 and 1978, respectively.[6]

Section 16—Union Security

(A) All present Employees who are members of the Local Union on the effective date of this subsection or on the date of execution of this Agreement, whichever is the later, shall remain members of the Local Union in good standing as a condition of employment. All present Employees who are not members of the Local Union and all Employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this sub-section of the date of this Agreement, whichever is the later. An Employee who has failed to acquire, or hereafter maintain, membership in the Union as herein provided, shall be terminated seventy-two (72) hours after his Employer has received written notice from an authorized representative of the Local Union certifying that membership has been, and is continuing to be, offered to such Employee on the same basis as all other members and further, that the Employee has had notice and opportunity to make all dues or Initiation Fees payments.

Section 18—Dues Check-off

(A) On the First Pay Day of each month, the Employer shall deduct from the wages of each Employee for dues payment to the Union, such sum as the monthly dues of the Union is or shall be at the time, and as authorized by the Employee. A check for the total money so deducted shall be immediately forwarded to the Secretary-Treasurer of the Union, together with a list of the Names of the Employees from whom the dues payments were deducted, which shall be furnished to the Employer from the Union.

This provision shall apply only after Employee, or the Union, has presented signed cards authorizing the Employer to make said deductions from the wages of the signer.

Also relevant to this proceeding is article VII of the Union's constitution and bylaws:

ARTICLE VII

Shop Unit Stewards

Section 1. The Stewards: Each shop unit shall be entitled to a Steward. The Steward shall be elected from the candidates nominated for that office in December each year. The candidate receiving the most votes cast by the membership of the shop unit shall be elected. The Steward shall act as Chairman of the shop unit meetings, when the Business Agent is not in attendance.

The Steward shall have the power to appoint assistant stewards. He shall have the power to appoint temporary stewards.

He shall be elected for a period of one year. The term to commence on January 1st each calendar year. Majority of members in a Shop Unit may petition for a Steward's Election in December of each calendar year. Said petition shall be submitted to the Business Agent who shall give one week's notice of the scheduled election for Steward, after he and the incumbent Steward have determined that the signatures on the petition are bona fide.

Section 2. To be eligible for the position of Steward and to be eligible to vote in an election for Shop Steward a member must have been initiated at a regular meeting of this Local Union, must have his dues paid for the month preceding the election, and must otherwise be in good standing in this Local Union.

In the event the majority of the unit members do not petition for a Steward's election in December of any year, the incumbent Shop Unit Steward shall continue in the position for the following Calendar Year.

In the event a vacancy occurs in the position of Shop Unit Steward during the calendar year, the Shop Unit Members shall nominate and elect, in accordance with these provisions, an eligible member to serve as Steward for the balance of the calendar year.

[5] The current agreement adds the following sentence: "If mutually agreeable and schedule allows, all vacation may be taken in either summer or winter schedules."

[6] The current agreement provides posting before May 15 in each year of the contract.

Section 3. During the Shop Unit Stewards' term (calendar year), the Shop Steward may be removed only by having charges preferred against him by an eligible member of the unit, an Officer or Business Agent of this Local Union, and after a full and fair hearing before the Executive Board and upon being found guilty of said charges.

Section 4. When none of the eligible members of a Shop Unit accept a nomination for Shop Unit Steward, the Business Agent shall appoint a Shop Unit Steward, from among the Shop Unit members, to be the Shop Unit Steward for the following Calendar Year, or the balance of the calendar year, as the case may be.

Section 9. Shop Stewards shall be the highest ranking union members in the unit. All union members must accept their word as union law during working hours. Members shall hold the Stewards in the highest esteem.

They shall insure the strict enforcement and observance of the Union's agreement. They shall be responsible for the carrying out of the Union's Constitution and By-Laws, Executive Board and membership decisions. They shall advocate and promote all Union projects among their units that have been approved by the Executive Board. They shall be responsible for the signing of new employees in their units, but only after said new employees have worked thirty (30) days. They shall make certain that all questions on the members applications are answered in accordance with this Constitution and By-Laws.

Angelo Vaccaro, the Charging Party herein and the General Counsel's only witness, was employed by the Company as a truckdriver for 29-1/2 years. He was terminated in July 1979.[7] Sometime In the late 196O's, Vaccaro ran for the office of shop steward against Victor Petozi, the incumbent, and Amil Maccie, another unit employee, pursuant to article VII of the Union's constitution and bylaws, described *supra*. The election resulted in a tie between Petozi and Maccie, and Maccie was declared the winner by the toss of a coin. Ever since that election, Maccie has continued to be the shop steward inasmuch as no employee since that time has been able to get 51 percent of the unit employees to sign a petition to have an election. During his employment by the Company, Vaccaro transported carbon dioxide in liquid and solid form from the Kearny facility to various States and, on occasion, to Canada. He drove both trailers and "straight jobs,"[8] and some of his trips were "over-the-road" assignments.[9] At all times material herein during 1979, the Company employed 19 unit employees.[10] On the seniority list, Vaccaro is listed as the number 2 senior employee, with Maccie number 7, whereas on the vacation list Vaccaro is number 3, and Maccie is number 1.

According to Vaccaro, seniority was the determining factor as to who received overtime work, over-the-road work,[11] Saturday, Sunday, and holiday work,[12] and vacations and, in each of the above categories, Maccie was given seniority over him. When Vaccaro complained to William Franklin, the Company's dispatcher, and to the union business agent, Edward Seconish, he was told that Shop Steward Maccie had superseniority. Vaccaro states that between December 14, 1978,[13] and July 1979, when Vaccaro was discharged, Maccie was assigned[14] weekend work and over-the-road work in preference to Vaccaro, at a time when Vaccaro was eligible for the work, sought the work, and did not refuse the work. Vaccaro also states that Maccie, not Vaccaro, received overtime work by being called in earlier than the regular starting time, but Vaccaro does not recall whether it occurred during the critical period. As for the 1979 vacations, Vaccaro testified that a vacation list headed by Maccie's name was posted on the bulletin board prior to June 1, and all unit employees were told to pick their vacation time pursuant to the terms of the contract, with Maccie having first choice.

On cross-examination of Vaccaro, the Union elicited the fact, and the General Counsel's Exhibit 4 confirms it, despite Vaccaro's protestations, that although Maccie selected 3 weeks in July for his vacation, three other employees with less seniority than Vaccaro also selected, and were granted, portions of those same 3 weeks, whereas Vaccaro selected 1 week in September. There was no evidence presented by the General Counsel to show that any employee was "bumped" from his selected vacation time. Also, and again despite Vaccaro's claim that Maccie had the longer over-the-road trips or took jobs away from Vaccaro, on cross-examination Vaccaro could not identify a single occurrence specifically, nor could he name a single instance when Maccie exercised his superseniority to "bump" Vaccaro, and no records were introduced by the General Counsel to establish definitively the accusations being made by Vaccaro. Moreover, the Union established that, from December 1978 to February 12, 1979, Vaccaro elected to work on the platform rather than drive a vehicle, and that from February 12, 1979, to March 12, 1979, Vaccaro was suspended,[15] but returned to work on the platform until March 17. As for weekend and holiday overtime work, Vaccaro testified that first Maccie was chosen, then J. Argieri (number 1 on the seniority list), and then Vaccaro, if there was enough work to go around; if not, Vaccaro did not work. Despite the Union's attempt to justify the steward's presence on the premises on weekends and holidays, Vaccaro disputes the necessity.

Seconish, the Union's business agent, testified regarding the election procedure for choosing stewards as stated in the Union's constitution and bylaws, and then

[7] His discharge is not a factor in this proceeding.

[8] A "straight job" is a one piece unit with a motor and a box in the back. Trailer work paid more than straight jobs.

[9] These assignments meant transporting or picking up goods a distance of at least 75 miles.

[10] See G.C. Exhs. 3 (Company's seniority list) and 4 (Company's vacation list).

[11] If there were two or more over-the-road jobs, the senior employee had the choice.

[12] As stated, *supra*, weekend and holiday work received overtime pay.

[13] A date 6 months prior to the filing of the charges herein.

[14] Jobs were not posted. They were handed out in the drivers' room by the company dispatcher.

[15] No explanation was given for Vaccaro's suspension and it is not alleged as being unlawful.

stated that normally the steward is on the job until after the end of the dispatch period each morning, after which he goes out on his run; if grievances are filed, the steward is apprised of them that night or the next morning. Seconish denied that Vaccaro ever complained to him about Maccie being given work opportunities ahead of Vaccaro, or that the Company ever told him that they had gotten a complaint from Vaccaro. Seconish agreed that the shop steward should be considered number 1 man for all purposes.

Maccie admitted that the collective-bargaining agreement gives him superseniority for all purposes, but he denies ever invoking it to displace another unit employee on an over-the-road job or a better paying job. Also, he testified that, even though he had superseniority for all purposes, he invoked section 22(c) of the contract, which gave him the option to be the last man dispatched each day, on a majority of occasions so that he could be present to take care of any grievances that may arise. He readily admitted that if no problems existed, he did not invoke the option; but, he denied having any choice in selecting a job run, claiming that selection was done by the dispatcher. Maccie further testified that, insofar as weekend and holiday work is concerned, he is the first one called in, and that makes him available to the unit employees 7 days a week, 24 hours a day. Maccie denies getting any other benefit from being shop steward. However, despite his denial and his statement that he never exercised his authority with regard to choosing a vacation time, on examination by me, Maccie stated that in the event one too many of the unit employees sought the same vacation time, he, Maccie, would not be bumped, but the junior man would, even though he had greater seniority than Maccie.[16] On cross-examination, Maccie admitted being called to work quite frequently by the Company before 7 a.m. and being paid overtime for those early hours.[17] He readily conceded that the basis for him getting the first opportunity to do overtime work was because of his position as shop steward.

B. *Analysis*

In *Dairylea Cooperative, Inc.*,[18] the Board held that superseniority clauses which are not on their face limited to layoff and recall[19] are presumptively unlawful and the burden of establishing justification is with the party asserting the legality of the clause. And, in *A.P.A Transport Corp.*,[20] in considering a contractual provision which required that union stewards be granted superseniority "for all purposes including layoff, rehire, bidding, and job preference,"[21] the Board held that "mere maintenance of a contract clause discriminatory on its face, without evidence of discriminatory enforcement or implementation, is sufficient to find a violation of Section 8(b)(1)(A) and (2) and Section 8(a)(3) and (1) of the Act," and the Board concluded that the clause in dispute was presumptively illegal and discriminatory. In light of the Board's holdings in these cases, and their application to the facts in the instant case, I must conclude that the superseniority clause in section 22(B) of the collective-bargaining agreement is an "all purposes" clause which is presumptively illegal and discriminatory.[22]

Before proceeding, however, to the question of whether the Respondents have successfully rebutted the presumption by establishing justification for the clause, I am initially confronted with Respondent Union's contention that the clause in question does not interfere with, restrain, or coerce the employees because in the instant case, unlike *Dairylea*, the steward is elected, not appointed, to the position, by vote of the eligible employees, without interference by the Union. The Respondent Union lays great stress on this contention and makes the argument that, where a collective-bargaining agreement contains a lawful union-security clause requiring membership in the union by every employee in the bargaining unit, as in the instant case, any employee, whether he is active or not in the union, is eligible to be elected shop steward; and since in this manner the Union has not exercised any control in the selection of the steward, it has not interfered with, restrained, or coerced employees in the exercise of their Section 7 rights, a necessary prerequisite for a *Dairylea* result.[23] The Board has been faced with this argument before. In *W. R. Grace & Co.*, 230 NLRB 259 (1977), the Board affirmed the rulings, findings, and conclusions of Administrative Law Judge Robert M. Schwartzbart wherein he commented (at 262):

> Although the majority in *Dairylea* did discuss the fact that, in that case, employees could gain superseniority only by being appointed to the position of steward by their union's hierarchy, at no point did the Board restrict its analysis to situations where officials were appointed to office, or preclude its application to situations where union officers were elected to their positions. Whether union officials are elected or appointed, in either case, the objective would be to select officers who would effectively advocate the position of the Union as the em-

[16] In the example used in the transcript, Maccie names the junior man, Bochese, who happens to be ahead of Maccie on the seniority list, G.C. Exh. 3.

[17] See sec. 7(G) of the contract, *supra*.

[18] 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976).

[19] For the purposes of this Decision, I shall treat the word "rehire" which is used in the instant contract, as the equivalent of the word "recall" which is used in the *Dairylea* case and its progeny.

[20] 239 NLRB 1407 (1979).

[21] This is the exact language of the superseniority clause in the instant case.

[22] *Preston Trucking Company, Inc.*, 236 NLRB 464 (1978); see *Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Interstate Motor Freight System, Inc.)*, 230 NLRB 81, fn. 1 (1977).

[23] Respondent Union cites *Motion Picture Laboratory Technicians, Local 780, International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, AFL-CIO (McGregor-Werner, Inc.)*, 227 NLRB 558 (1976), as favoring this position. I do not agree. In *McGregor-Werner*, the contract provided, *inter alia*, that the union stewards are to be given top seniority "for purposes of layoff, recall, and shift preference," and the Board, in finding the clause lawful, concluded that the steward used his superseniority to retain the same job classification on another shift that he had prior to the discontinuation of the old shift, in order to serve the legitimate purpose of having the continued presence of a steward on the job. The Board's reference to the election of the steward was dicta and was not dispositive of the case.

> ployees' representative. I, therefore, do not find the distinction between elected and appointed stewards particularly meaningful. Moreover, to be eligible to hold union office, or even to vote in an election for those who would hold office, employees must be members of the Respondent Union. Most significantly, the underlined policy of the Act in this area is to separate union activities from terms and conditions of employment. Thus, it is the given situation which is proscribed, not the means by which that situation is created. For these reasons, I find that the fact that the Respondent Union's steward was elected rather than appointed does not preclude application of the *Dairylea* principle to the clause granting stewards superseniority for job benefits which are not on their face limited to layoff or recall.

And, in *Perfection Automotive Products Corporation*, 232 NLRB 690 (1977), the superseniority clause was found to be unlawful wherein the steward was elected under circumstances strikingly similar to those in the instant case. Under the circumstances, I reject Respondent Union's contention and find no distinction between election and appointment of shop stewards when faced with a presumptively unlawful superseniority clause.

I turn now to Respondent Union's contention that the evidence presented has successfully rebutted the presumption of invalidity and has established sufficient business justification for the maintenance and enforcement of the superseniority clause. The consideration most often relied upon to justify superseniority for stewards is the asserted need to have a steward present on the job so that he can perform day-to-day contract administration functions, including grievance handling, for the unit employees. In my examination of the evidence presented by Respondent Union, I do not find the justification offered to be sufficient. In fact, I find very little evidence offered to show justification. Rather, I find Respondent Union engaging in a refutation of the General Counsel's evidence by attempting to establish the fact that the superseniority clause's broad mandate had not been applied. While I am inclined to agree with Respondent Union's contention that the evidence offered by the General Counsel falls far short of the mark in demonstrating the enforcement of the clause, except for the weekend and holiday area which is readily admitted by Respondent Union, I am equally unable to find that the Respondents justified the maintenance of such a broad superseniority clause. Although Respondent Union showed that Maccie had processed grievances, it did not adequately demonstrate to me that the preferences that Maccie received in performing weekend and holiday work bore any direct relationship to furthering the effective administration of the contract. Both Seconish and Maccie testified that Maccie would process grievances received on a particular day either that night or the next morning. But, no attempt was made by Respondent Union to show, either by the introduction of records or oral testimony, that Maccie could not satisfactorily carry out his responsibilities without exercising his superseniority; and no evidence was offered to show that grievances were processed on weekends and holidays. When a union attempts to justify the application of a superseniority clause to shop steward in a situation where the clause goes beyond layoff and recall, the Board will strictly scrutinize this enforcement, and the union must bear the burden of demonstrating the necessity for the clause.[24] As for Respondent Union's alternative contention on this point, i.e., the clause is inoperative, in the absence of an affirmative showing that the unlawful clause has been eradicated by practice the Board has held that such a clause is, unless adequately justified, violative of the Act merely by its maintenance since it has "the inherent tendency . . . to discriminate against employees for union related reasons."[25] Moreover, although the evidence presented by the General Counsel through his one witness does not sustain the enforcement allegation in the complaint in all respects,[26] it does state sufficient unrefuted facts to show enforcement of the invalid clause. As stated above, Maccie readily admitted that he was the first employee assigned to weekend and holiday runs, and that he is frequently called to work by Respondent Company before 7 a.m. and paid overtime for the early hours, all because of his position as shop steward. In addition, as shown on the vacation list, Maccie is number 1, and although it was not proven by the General Counsel that he "bumped" anyone on the list, it is clear to me that he had first choice.[27]

Respondent Union further contends in its brief that, should a violation be found, it should be limited to weekend and holiday work. For the reasons stated above, in which I have found that, in addition to weekend and holiday work, the Respondents have permitted Maccie to exercise his superseniority as shop steward, unlawfully, in the area of early hour overtime and vacations,[28] I hereby reject this contention.[29]

Under the circumstances of this case, I find that section 22(b) of the collective-bargaining agreement which accords superseniority to Respondent Union's steward for all purposes including layoff, rehire, bidding, and job preference, such as delivery of early loads, overtime work on weekends and holidays, and vacations, is presumptively unlawful. It further is concluded that the Respondents have not demonstrated sufficient justification

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[24] See *Preston Trucking Company, Inc.*, *supra* at 465.

[25] See *Perfection Automotive Products*, *supra*.

[26] I do not credit Vaccaro's testimony with regard to Maccie being given longer over-the-road trips, or ever being "bumped" by Maccie, or Maccie getting better paying jobs. His testimony was unconvincing in that he was unable to detail a single occurrence specifically and he offered no record proof of such occurrences.

[27] While the contract does not state that vacations shall be subject to seniority, the list is compiled in seniority order, and I find that seniority governs this benefit as well as the others subject to the superseniority clause.

[28] Inasmuch as a vacation benefit, limited only to the question as to when it should be taken, is not subject to any loss of earnings, I shall not order a monetary remedy in this respect.

[29] Respondent Union's final contention is that any backpay award should only be assessed against Respondent Company, because it had sole control over the assignment of work; the Union cites *Maui Surf Hotel Company*, 235 NLRB 957 (1978), in support. Suffice it to say that the Union has cited an excerpt from the dissent in that case and, moreover, unlike the collective-bargaining agreement in the case cited, the superseniority clause herein is clearly inconsistent with the Act's rationale. This contention is therefore rejected.

to rebut this presumption by their failure to establish that such benefits have the effect of furthering the effective administration of the collective-bargaining agreements and the bargaining relationship. Accordingly, it is found that, by maintaining and enforcing the superseniority clause, Respondent Company has violated Section 8(a)(1) and (3) of the Act and Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act. Moreover, by according Steward Maccie superseniority with respect to the assignment of early hour runs before 7 a.m. and paying him overtime for them, and by giving Maccie the first opportunity to perform overtime work on weekends and holidays, the Respondents have discriminated against employee Vaccaro in violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. Liquid Carbonic Corporation, Inc., is, and at all times material herein has been, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a seniority clause in their collective-bargaining agreement, according union stewards superseniority for terms and conditions of employment not limited to layoff and recall, Respondent Company and Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively.

4. By discriminating against Angelo Vaccaro in assigning superseniority to Respondent Union's steward with respect to the assignment of early hour runs before 7 a.m. and paying him overtime for them, and by giving the steward the first opportunity to perform overtime work on weekends and holidays, the Respondents engaged in further violations of the foregoing sections of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

And, having found that the Respondents have discriminated against Angelo Vaccaro by so applying the unlawful superseniority clause as to deny Vaccaro the assignment of early hour runs before 7 a.m. and overtime work on weekends and holidays, I shall recommend that the Respondents, jointly and severally, make Vaccaro whole for any loss of earnings he may have sustained as a result of the discrimination against him. Backpay shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[30]

A. The Respondent Company, Liquid Carbonic Corporation, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing collective-bargaining provisions with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, according union stewards superseniority with respect to terms and conditions of employment other than layoff or recall.

(b) Discriminating against Angelo Vaccaro, or any other employee, in the assignment of early hour runs before 7 a.m. and overtime work on weekends and holidays, or any other term and condition of employment other than layoff or recall, by according seniority to the union steward in the assignment of such terms and conditions of employment where the union steward, in fact, does not have seniority in terms of length of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Union make Angelo Vaccaro whole for any loss of earnings he may have suffered as a result of the discrimination against him, such earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due with respect to the work assignments and overtime premium pay under the terms of this Order.

(c) Post at its establishment in Kearny, New Jersey, copies of the attached notices marked "Appendix A" and "Appendix B."[31] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by representatives of Respondent Company and Respondent Union, shall be posted by Re-

[30] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[31] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent Company has taken to comply herewith.

B. Respondent Union, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Maintaining, enforcing, or otherwise giving effect to those clauses in its collective-bargaining agreements with Respondent Company, Liquid Carbonic Corporation, Inc., according union stewards' superseniority with respect to terms and conditions of employment other than layoff and recall.

(b) Causing or attempting to cause Respondent Company to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing the employees of Respondent Company in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Company make Angelo Vaccaro whole for any loss of earnings he may have suffered by reason of the discrimination against him, such lost earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Company's Kearny, New Jersey, facility copies of the attached notices marked "Appendix A" and "Appendix B."[32] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by representatives of Respondent Company and Respondent Union, respectively, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

[32] See fn. 31, *supra*.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which we were represented and presented evidence, it has been found that we have violated the National Labor Relations Act in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT maintain and enforce any agreement with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, giving union stewards top seniority no matter what their length of employment with respect to terms and conditions of employment, except for layoff and recall.

WE WILL NOT discriminate against Angelo Vaccaro, or any other employee, in the assignment of early hour runs before 7 a.m. and overtime work on weekends and holidays, or any other terms or conditions of employment other than layoff and recall, by according seniority to a union steward when such union steward, in fact, does not have seniority in terms of length of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL NOT jointly and severally with the above-named Union pay, with interest, Angelo Vaccaro any earnings lost as a result of assigning early hour runs before 7 a.m. and overtime work on weekends and holidays to the union steward rather than to Vaccaro when Vaccaro had seniority in terms of length of service.

LIQUID CARBONIC CORPORATION, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which we were represented and presented evidence, it has been found that we have violated the National Labor Relations Act in certain respects. To correct and remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT maintain and enforce any agreement with Liquid Carbonic Corporation, Inc., or any other employer, giving our stewards or other representatives top seniority no matter what their length of employment, with respect to terms and conditions of employment, except for layoff and recall.

WE WILL NOT cause or seek to cause Liquid Carbonic Corporation, Inc., to discriminate against Angelo Vaccaro or any other employer in the assignment of early hour runs before 7 a.m. and overtime work on weekends and holidays, or any other terms or conditions of employment other than layoff and recall, by according seniority to a union steward when such steward, in fact, does not have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of thier rights protected by Section 7 of the Act.

WE WILL, jointly and severally with Liquid Carbonic Corporation, Inc., pay, with interest, Angelo Vaccaro any earnings lost as a result of assigning early hour runs before 7 a.m. and overtime work on weekends and holiays to the union steward rather than to Vaccaro when Vaccaro had seniority in terms of length of service.

LOCAL 478, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA